April 1, 2015

Kevin G. Ennis, Esq.
Richards Watson Gershon
355 South Grand Avenue, 40th Floor
Los Angeles, California 90071

Re: Your Request for Advice
Our File No. A-15-006

Dear Mr. Ennis:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act")[1] and Section 1090. We do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate.

We are required to forward your request for advice under Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Los Angeles County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

Are employees of a consulting company to the City of Hawthorne considered "employees" under Section 1090 or "consultants" under the Act making them subject to the conflict of interest provisions of either?

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

The employees are subject to the provisions of Section 1090 as "employees" but they are not financially interested in the contract. The employees are not "consultants" under the Act.

FACTS

You are Special Counsel to the City of Hawthorne. You write on behalf of the City Attorney and the City Council regarding a consulting agreement between the City and Good Energy, LP. The City is considering whether to enter into a consulting agreement with Good Energy, LP, which would assist the City in establishing and then managing a community choice aggregation program ("Program"). California Public Utilities Code Section 366.2 authorizes these Programs and allows for the purchase of electricity by a city or county that the incumbent investor-owned utility is required to distribute to customers of the city or county.

The proposed professional energy consulting services agreement would engage Good Energy to perform "Program Design Services" and "Program Management Services." In summary, the services that Good Energy would perform under the "Program Design Services" of the agreement would include preparing a feasibility study to help the City determine if the Program has viability and preparing an implementation plan to set up the Program. For the "Program Management Services," Good Energy would coordinate the City's efforts to design and implement a public education and marketing plan to explain the Program and its "opt-out" component, finalize an implementation plan that must be approved by the California Public Utilities Commission, prepare bids packages for, and negotiate contracts with selected energy suppliers, and perform other services to manage the Program. Good Energy will present each potential to the City, which will make the final decision on every point. The City must substantively review any recommendations.

Good Energy's proposed contract provides that City would pay Good Energy a flat fee of $100,000 for the "Program Design Services." For the "Program Management Services," the proposed compensation would be fixed at a rate of $.001/kilowatt-hour to be paid for by the selected electricity supplier per kWh (volumetrically) for electricity purchased for the duration of the municipal contract. These terms will be negotiated between the City and Good Energy before Good Energy begins work on the contract, including seeking and negotiating with energy providers. No matter the energy supplier Good Energy presents or the City chooses, these terms remain fixed.

ANALYSIS

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their

agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id*. at pp. 646-649.) We employ the following six step analysis.

Step One: Are Good Energy Employees subject to the provisions of Section 1090?

Section 1090's prohibitions apply to, among other positions, "city officers or employees." A person who advises a city may fall within the scope of Section 1090. (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal. App. 4th 1114, pp. 1124-1125.) In particular, an independent contractor whose position carries the potential to exert influence over the contracting decisions of the agency is subject to Section 1090 and may not have personal interests in the contracts. (*Ibid.*; see also *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682, 693.) In *Hub City*, the court stated that a person's status as an official under Section 1090 "turns on the extent to which the person influences an agency's contracting decisions or otherwise acts in a capacity that demands the public trust." (*Hub City*, *supra*, at p. 1125.)

Here, once Good Energy enters into the contract for services with the City, it will act as the City's expert in both establishing and maintaining the various facets of the contract. Good Energy will select suppliers for the City's approval, negotiate contracts, and use its expertise to exert its influence over the agency's contractual decisions. Because providing the City's residents and consumers with an energy supply is a public function, and Good Energy will participate in and have influence over the related decisions, Good Energy also "acts in a capacity that demands the public trust."

Consequently, as a contractor and advisor to the City, Good Energy employees are subject to Section 1090.

Steps Two and Three: Does the decision at issue involve a contract that Good Energy will participate in making?

To determine whether the decision involves a contract, general principles of contract law apply. (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).) Even so, "specific rules applicable to sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of 'contract.'" (*People v. Honig*, *supra*, at p. 351 citing *Stigall v. City of Taft*, *supra*, at pp. 569, 571.)

Once Good Energy enters into a contract with the City and completes the establishing phase, it will then seek bids from energy providers, who may ultimately enter into contracts with

the City to provide energy. As mentioned above, Good Energy will be an integral part of this process because it will advise the City regarding the bids it obtains, present the relevant information, and guide the City's decision in selecting a contractor or contractors. It will also negotiate the contracts on the City's behalf. Accordingly, Good Energy will be participating in City decisions involving energy contracts.

Step Four: Do Good Energy employees have a financial interest in the contract?

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest" (*People v. Honig, supra*, 48 Cal.App.4th at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid*.)

Although section 1090 nowhere specifically defines the term "financial interest," case law and Attorney General Opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson v. Call*, *supra*, 38 Cal.3d at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

The main issue is whether the Good Energy employees will have a financial interest in the energy contracts between the City and the energy suppliers that Good Energy recruits and recommends. We do not believe they will. As mentioned, the contract between Good Energy and the City limits the compensation Good Energy can receive. To initialize the Program and conduct a feasibility study, educate consumers, and create an "opt-out" option, Good Energy will receive a flat fee of $100,000. This portion of Good Energy's contract is not subject to changes. Once Good Energy moves to the implementation phase, Good Energy's compensation is based entirely on usage. More specifically, Good Energy will receive $0.001 per kilowatt hour that City consumers use. Indeed, the contract between Good Energy and the City fixes the compensation it will receive from the energy contracts at the outset. No matter the contract for energy supply obtained, Good Energy's compensation will remain at that rate.

As discussed above, Good Energy employees may not have a financial interest in the contracts it negotiates or influences. Under your facts, Good Energy has neither the possibility of financial loss or gain. The contract amount was already negotiated with the city and is not subject to change. This alone does not create a "financial interest" in the contracts. (*See e.g.*, *Thomson, supra*, 38 Cal.3d at pp. 651-652 [financial interests generally involve the possibility of financial gain or loss].) A financial interest could arise, however, if any Good Energy employee has a financial interest in any of the companies subject to the negotiations or contracts themselves. Financial interests under Section 1090, while not explicitly defined, are viewed broadly. The Good Energy contract with the City may not create a financial interest, but we caution that other interests may.

Under your facts, Good Energy does not have a financial interest in the energy supply contracts, and Section 1090 does not prohibit Good Energy from seeking suppliers, negotiating terms, and advising the City with respect to those contracts.

The Act

Section 87100 prohibits any public official, including a consultant, from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. The analysis of whether a person who has a contract with a public entity is a "consultant" for purposes of Section 87100 is distinct from the inquiry under Section 1090. If a person is considered a consultant for purposes of the Act, he or she is subject to the conflict of interest provisions therein and, if conflicted, must recuse him or herself from any governmental decisions, including influencing decisions.

The Act defines "public official" to include "every member, officer, employee or *consultant* of a state or local government agency." (Section 82048, emphasis added.) In addition, the Act defines the term "designated employee" to include "any officer, employee, member, or consultant" of any agency who meets specified criteria. (Section 82019, emphasis added.) Under the Act, each agency is required to adopt a conflict-of-interest code, which sets forth positions within the agency for which Statements of Economic Interests must be filed. (Section 87300.) Typically an agency's conflict of interest code includes designations for consultants to the agency.

A "consultant" is an individual who works pursuant to a contract with an agency and is both a public official and designated employee under the Act if he or she engages in the following activities under the contract:

> "(A) Makes a government decision whether to:
>
> (i) Approve a rate, rule, or regulation;
>
> (ii) Adopt or enforce a law;
>
> (iii) Issue, deny, suspend, or revoke any permit license, application, certificate, approval, order, or similar authorization or entitlement;
>
> (iv) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
>
> (v) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;
>
> (vi) Grant agency approval to a plan, design, report, study, or similar item;
>
> (vii) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or
>
> (B) Serves in a staff capacity with the agency and in that capacity participates in making a government decision as defined in regulation 18702.2 or performs the same or substantially all the same duties for the agency that would

> otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Government Code section 87302."

(Regulation 18704.6(a)(1).) Thus, there are two ways that an individual can become a "consultant." First, an individual is a "consultant" if he or she, pursuant to a contract with a government agency, makes government decisions as described in Regulation 18704.6(a)(1). Alternatively, an individual may be a "consultant" if he or she, pursuant to a contract with a government agency, serves in a staff capacity and either participates in governmental decisions (as defined) or performs the same or substantially all the same duties that would otherwise be performed by an individual in a position listed in the agency's conflict-of-interest code.

1. Makes government decisions

As described in Regulation 18704.6(a)(1) above, if an individual is performing services under a contract with a government agency and "makes a government decision" for the agency as listed in that provision, he or she is a consultant. This does not seem to be the case in relation to the relationship between Good Energy and the City that you describe. Rather than actually "making" government decisions of the type listed above in his or her contracting capacity with the government agency, Good Energy employees are instead advising the City's personnel and city council. Therefore, we look to the second manner in which an individual may become a consultant under Regulation 18704.6(a)(2).

2. Serves in a staff capacity

The Commission has construed the phrase "serves in a staff capacity" in Regulation 18704.6(a)(2) to include only those individuals who are performing substantially all the same tasks that normally would be performed by one or more staff members of a governmental agency. Implicit in the notion of service in a staff capacity is an ongoing relationship between the contractor and the public agency. Based on your facts, Good Energy employees are not acting in a staff capacity.

We have previously found that a contractor serves in a staff capacity when the contract calls for work to be performed "over more than one year" on "high level" projects (*Ferber* Advice Letter, No. A-98-118). We have further advised that a contractor does not act in a staff capacity where the work is to be performed on one project or a limited number of projects over a limited period of time (*Sanchez* Advice Letter, No. A-97-438), where the relationship between the contractor and the agency would last only 12 - 16 months with no ongoing relationship contemplated (*Harris* Advice Letter, No. A-02-239) and where, under a multi-year contract, the contractor would perform only on a sporadic basis. (*Maze* Advice Letter, No. I-95-296; *Parry* Advice Letter, No. I-95-064.)

In the establishing phase of the contract, Good Energy employees will work on a time-limited basis to create the program, likely under one year. Additionally, this is the only project in which Good Energy will engage on the City's behalf and will simultaneously be staffed country-wide for other entities engaged in similar pursuits. Under these facts, Good Energy employees are not "employees" during the establishing phase of the contract.

Once that phase ends, and assuming the City decides the project is feasible, the implementation phase follows. As above, Good Energy has one primary task in the implementation phase: identifying energy suppliers to present for the City's review. Rather than an on-going and open-ended relationship, the contract ends by its terms when the contract with the energy supplier concludes. Once the energy suppliers are chosen, the contract requires only sporadic maintenance. These facts do not meet the threshold test for "serving in a staff capacity" under the Act.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

John W. Wallace
Assistant General Counsel

By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl